IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1031 OF 2006

ALONGWITH

WRIT PETITION NO. 1039 OF 2006

Dr. Kusum R. Agarwal .... Petitioner

versus

Bharatchand J. Thakker & anr.... Respondents.

Shri R.S.Tripathi for the petitioner. Shri Vaibhav Mehta i/b.Divyakant Mehta for the respondents.

CORAM; P.V. KAKADE, J.

DATED; FEBRUARY 22, 2006.

P.C:

1. Heard the learned advocate for the Petitioner and the learned advocate for the respondent. Perused the record.

2. Rule. Rule made returnable forthwith.

3. Both these petitions can be disposed of by this common order as common evidence is being recorded by the trial court in both the matters.

4. The petitioner/defendant has taken out this petition against the order passed by the lower

appellate court dated 23-1-2006 dismissing his appeal No. 91/06 in Interim Notice No. 3267 of 2005 in R.A.E.Suit No. 713/1294/1999 confirming the order passed by the trial court dated 14-12-2005 making the notice absolute and allowing the plaintiff to take inspection of the suit premises with their Engineer and/or Architect and also to take photographs of the suit premises in presence of the defendant.

5. The respondent/plaintiff has filed the suit against the petitioner/tenant under section 13(1)(i) of Bombay Rent Act alleging that tenant had made permanent additions and alterations in the suit property. The suit came to be filed in the year 1999, further notice was issued in that regard terminating the tenancy. In the course of the suit, the Court Commissioner was appointed on 15-7-1998 for inspection of the suit premises and his report dated 20-7-1998 is on record. Thereafter the trial proceeded and in the year 2005 the evidence of the plaintiff was over at which time an application was made by the plaintiff seeking inspection of the suit premises with the help of expert Engineer and/or architect and seeking further permission to take photographs of the alleged permanent additions and alterations.

6. This application was vehemently contested by the

present petitioner internally submitting that the Court Commissioner's report was on record and therefore inspection was not necessary and plaintiff had no right to inspect the property after obtaining the order of appointment of Court Commissioner whose report was on record.

7. After hearing both the parties, the trial court came to the conclusion that though the suit was filed in the year 1998 and was pending, the application was filed on 17-11-2005 and therefore the provisions of the newly amended Maharashtra Rent Control Act which came into force in 2000 would be applicable and by virtue of section 28 of the said new Act, inspection of the property would be allowed.

8. On this basis without giving any plausible reasoning, the trial court proceeded to make the notice absolute and allowed the inspection of the property.

9. An appeal was preferred against the said order and the Appellate court was of the view that no prejudice would be caused to the defendant tenant, if the property is inspected because it would prevail only the present condition of the suit premises. According to the appellate court in old Bombay Rent Act, there was no provision which prohibits the landlord from taking

inspection and therefore there is no question of right by either of the party under section 28 of the Maharashtra Rent Act, 1999 and with these observations the appeal was summarily dismissed. Hence the present petition.

10. At the outset it may be noted that the suit is at the stage of recording of evidence and plaintiff's evidence is over, at which time the impugned application for inspection of the property was made. Without further elaboration it must be noted that suit would be governed by provisions of Bombay Rent Act and not under the provisions of Maharashtra Rent Act and therefore the reasoning adopted by the trial court on which the appellate court appears to be quite silent is misplaced and therefore cannot be accepted in law. Be as it may, the question remains as to whether the order passed by the trial court allowing inspection is just legal and proper and therefore if it is required to be quashed under the circumstances.

11. In this regard it must be borne in mind that the Court Commissioner was appointed at the request of the respondent whose report was submitted in the court on 20th July 1998 pertaining to the alleged permanent additions and alterations. Thereafter in the year 2005 the parties have proceeded to lead evidence and

plaintiff's evidence is over. It is significant to note that copy of the application of the plaintiff in this regard is conspicuously silent as to under what ground he thought it fit to seek inspection of the suit premises after his evidence is completed. It is not the case that there is any subsequent event or any additional construction is made by the tenant in the year 2005 and after Court Commissioner's report was submitted which would necessitate fresh inspection of the property. Under these circumstances, on factual matrix I hold that this is nothing but an attempt to fill in the lacuna in the evidence of the plaintiff which cannot be allowed in law. It is further needless to mention that the parties have proceeded the suit on the basis of cause of action, which prevailed according to the plaintiff, prior to filing of the suit in the year 1998, and therefore appellate court's observations that no prejudice would be caused to the tenant by making inspection at this stage which would reveal the present condition of the suit premises, appears to be not only ill conceived but unwarranted, overlooking the very basis of the procedural law especially when there is not a whisper of suggestion from the plaintiff to show that any subsequent alteration or addition is made by the tenant in the suit property after the Court Commissioner's report is filed. Obviously the court will proceed on the basis of the available evidence

which is including the report of the Court Commissioner regarding the status of the suit property and court cannot allow the parties to fill in the lacuna in such a manner by allowing the inspection. It is true, as observed by the appellate court, that there is no prohibition under the old provision of the Bombay Rent Act for the landlord from taking any inspection. However the question is of the propriety in the face of the dispute between the parties and therefore I am of the considered view that the order passed by the court below requires to be set aside.

12. In the result, the rule is made absolute and order passed by the trial court as well as appellate court are hereby set aside. Notice is discharged and no inspection at this stage can be granted. With these directions, the petition stands disposed of with no order as to costs.

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